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No. 96-1465

In The

Supreme Court of the United States

October Term, 1996

UNION PACIFIC RAILROAD COMPANY and MODESTO AND EMPIRE TRACTION COMPANY,

Petitioners,

-against-

COMSOURCE INDEPENDENT FOODSERVICE COMPANIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE CARL PEZOLD
RAYMOND A. SELVAGGIO
AUGELLO, PEZOLD & HIRSCHMANN, P.C.
120 Main Street
Huntington, New York 11743
Telephone: (516) 427-0100

ANDREW J. SKAFF
KAREN L. PETERSON
Counsel of Record
KNOX RICKSEN
1999 Harrison Street, Suite 1700
Oakland, California 94612
Telephone: (510) 893-1000

Attorneys for Respondent, Comsource Independent Foodservice Companies, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

QUESTION PRESENTED

Whether a rail common carrier must provide a shipper with reasonable notice, an option to select full liability terms and a choice of rates when offering "alternative terms" pursuant to 49 USC 10505(e).

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STATEMENT OF THE CASE

The "Carmack Amendment", originally enacted in 1906, created uniformity and stability in the law of loss or damage to goods in interstate transportation. It codified the common law that carriers are liable for full actual loss, unless a shipper voluntarily agrees in writing to a limitation of liability in return for a reduction in the freight rate; it created joint and several liability as to the receiving and delivering carriers, and it established minimum time limits for the filing of claims (9 months from delivery) and the commencement of suits (2 years from declination). Notwithstanding widespread acceptance of these principles, litigation still arises in two general areas: limitations of liability and time limits for claims and suits.

This case involves an attempt by UP to enforce a one-year time limit for bringing suit which was set forth in an unfiled tariff, "UP Exempt 1-F", and which was allegedly incorporated by reference in shipping documents.

UP contends that it was not subject to the minimum 2-year time limit specified in the Carmack Amendment. It points out that the commodity transported was exempt from economic regulation under 49 USC § 10505, and therefore subject to Section 10505(e) which provides:

> (e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the

> authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

The language of this section is clear: rail carriers are subject to section 11707 (Carmack), but they may offer "alternative terms". Thus, it would be a reasonable presumption that Carmack terms and conditions would apply to a movement, unless the rail carrier actually offers alternative terms and the shipper agrees to accept them.

The Ninth Circuit essentially applied common law principles of reasonable notice and contract law. It weighed the facts before it and concluded that UP had failed to meet its burden of proving that it had given the shipper proper notice of the short time limit and the Carmack liability option. Stated differently, the shipper had not accepted the carrier's offer of alternative terms.

The Ninth Circuit correctly applied the law.

ARGUMENT

1. The UP exempt circular did not contain an alternative rate for Carmack liability

UP argues that "the sole question should be whether the provisions in its governing publication or exempt circular offered alternative rates for the shipment . . . " UP also states " . . . UP offered alternative rates for the shipment. However, this issue was not addressed by the panel . . . " (Brief p. 12)

In the case at bar, the bill of lading contained a notation referencing "Letter Quote UP EBFF-3". UP EBFF-03 is the alphanumeric code for the Eastbound Frozen Food Rate Sheet No. 3. This rate sheet states that the rates contained therein are subject to the provisions contained in two other documents, namely UP Exempt 1-Series Circular and UPFE Exempt 1-Series Circular. The Governing Publication to the UP Exempt Circular contained, *inter alia*, reference to the shortened time limit which UP sought to enforce. [ER 5, pp. 107-109, CR 53]

The UP circular does not contain *any* rate or premium for Carmack liability. Item 8 of UP Exempt 1-F contains only the cryptic statement: "Information including the charges for 'Section 11707 liability' can be obtained by calling our toll free phone numbers." There is no phone number listed in the Item. [ER 2, p. 25; CR 54, p.19] Even if the shipper knew to look at this document, it would not be able to determine the rate for Carmack liability.

2. UP is a common carrier

UP suggests (Brief pp. 12-13) that the traditional legal principles and court decisions dealing with common carriers are inapplicable because the shipment was "deregulated" or "exempt" from economic regulation. This is a red herring.

UP is a common carrier. A common carrier is one which holds itself out to the general public to provide transportation services. The fact that the ICC has administratively exempted certain rail traffic from economic rate regulation does not change the nature of the carriage. *Quasar Co. v. Atchison, T. & S.F. R. Co.*, 632 F.Supp. 1106,

1113 (N.D.Ill. 1986); *Co-Operative Shippers, Inc. v. Atchison, T. & S.F. R. Co.*, 613 F.Supp. 788, 792 (N.D. Ill. 1985), aff'd in part, rev'd in part, 840 F.2d 447 (7th Cir. 1988). *See also, Hughes Aircraft Co. v. North American Van Lines, Inc.*, 970 F.2d 609, 613 (9th Cir. 1992); *Railroad Co. v. Lockwood*, 84 U.S. (17 Wall.) 357, 21 L.Ed. 627 (1873).

3. The panel correctly focussed on the notice issue

UP argues that "The panel applied inapplicable cases which related to whether notice was given to the shipper by UP concerning the condition precedent . . . " (Brief p. 13)

The panel may not have employed proper transportation law "words of art" in referring to UP's circular as a "tariff" or the time limit as a "statute of limitations". However, it was correct in focussing on the issue of *notice*.

If the UP circular had been on file with the ICC as a tariff, shippers would have been deemed to have constructive notice of its provisions. Cf. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). However, it was not filed with ICC or anywhere else which would have constituted official public notice.

The fact that it was an unfiled "tariff" makes the question of notice a critical issue. Constructive notice can not be presumed. The panel properly concluded – on the facts before it – that UP failed to meet its burden of proving that it had given the shipper adequate notice of

its short time limit provision and the option to obtain Carmack liability coverage.

Generally, when one offers an alternative choice to a main proposition, the alternative must be the object that is affirmatively accepted or rejected. In the context of Section 10505(e), when offering differing terms to a shipper, it is the Carmack terms which are the main proposition and the terms allowed under Staggers must be the alternative. Drafting contract terms to the contrary turns the statutes on their head. *See Consolidated Rail Corporation v. Sobiech*, 710 F.Supp. 988 (S.D.N.Y. 1989) ("*Sobiech I*"); *Fruitco Corporation v. Consolidated Rail Corporation*, 118 Misc.2d 1090, 462 N.Y.S.2d 754 (N.Y. City Civ. Ct. 1983).

In *Sobiech I*, the court held that:

> Section 10505(e) requires carriers to provide terms consistent with Carmack in the first instance. They may offer terms alternative to Carmack, which may be accepted or rejected by the shipper. But, in any event, unless the shipper affirmatively elects the alternative limited liability terms, the Carmack terms should apply.

710 F.Supp. at 990.

4. UP's reliance on Co-Operative Shippers and Yamazen is misplaced

UP argues that its shipping contract provided a meaningful choice in accordance with § 10505(e). In support of its position, UP relies upon two decisions by the Seventh Circuit Court of Appeals: *Co-Operative Shippers, Inc. v. The Atchison, T. & S.F. R. Co.*, 860 F.2d 447 (7th Cir. 1988), and *Yamazen U.S.A., Inc. v. Chicago & Northwestern*

Transp. Co., 790 F.2d 621 (7th Cir. 1986). These cases, however, do not represent a majority view and have been rejected by other courts. *See Consolidated Rail Corp. v. Ted Sobiech Farms*, 717 F.Supp. 1062 (S.D.N.Y. 1989) ("*Sobiech II*"), wherein Judge Edelstein rejected ConRail's attempt to overturn his previous decision (*Sobiech I*) based on the Seventh Circuit precedent relied upon by Defendant herein.

> As a preliminary matter this court is not bound by the prevailing precedent in the Seventh Circuit. . . . This court found, and still believes, that the Seventh Circuit's interpretation of the Carmack Amendment is not persuasive.
>
> Moreover, the plaintiff has submitted a slip opinion from the Northern District of Illinois acknowledging the prevailing rule in the Seventh Circuit. **Interestingly, Judge James B. Moran, the author of that opinion, concurs that the Seventh Circuit apparently stands alone in its view of the Carmack Amendment's effect. He writes: "This case presents a perfect example of the 'trap' set by a form contract which requires shippers to affirmatively elect full coverage in a deregulated shipment contract. Although the ICC, and other courts, have serious trepidations about such limitations, the Seventh Circuit disagrees."** ***Quasar Company v. Atchison, Topeka & Santa Fe Railway Co.*****, No. 88 C. 4617, Slip Op. at 6 (April 27, 1989). This court joins the "other courts" that have serious trepidations of the Seventh Circuit's view.**

Id. at 1063 (emphasis added).

In any event, the Seventh Circuit cases relied upon by UP are distinguishable from the instant case.

ComSource was quoted a ***single*** rate for the shipment in issue. It was never informed that it had the option to choose a different rate or different terms of liability. Thus, even if the provisions of Item 8 were deemed to comply with § 10505(e), the short time limit is unenforceable because ComSource had no knowledge of this provision and consequently never had the opportunity to make a choice, much less an informed choice. In this context, UP's reliance upon the Seventh Circuit cases is misplaced.

In *Co-Operative Shippers, supra,* Co-Operative and Santa Fe conducted extensive negotiations which lasted almost three months before the contract was finally executed. Indeed, Co-Operative acknowledged that in reviewing the contract it ignored the limitations of liability set forth therein. Based on the extensive contract negotiations that took place, the court held that Co-Operative had sufficient notice of the carrier's liability limits and a **fair opportunity** to obtain greater protection. The court expressly stated, "**[t]his is not a case in which a carrier sought to limit its liability by mere implication. Instead, Co-Op made a well, informed, deliberate and absolute choice.**" 840 F.2d at 451 (emphasis added).

Notably absent from the court's opinion in *Co-Operative Shippers* is any discussion about binding a shipper based on the doctrine of constructive notice. Indeed, the court observed quite the opposite where it stated that "[t]his is not a case in which a carrier [seeks] to limit its liability by mere implication." Thus, even under the reasoning in *Co-Operative Shippers,* if the language of the tariff were deemed to meet the requirements of Section 10505(e), this is negated by the fact that ComSource was

never given a reasonable opportunity to review this provision. Clearly, based on the facts in this case, Defendant's reliance upon *Co-Operative Shippers* is misplaced.

Defendant's reliance upon *Yamazen, supra,* is also unavailing. In that case the shipper filed suit two years and seven month after its claim was disallowed by the railroad. Thus, the court found that the shipper's suit was time-barred under the Carmack Amendment.

5. The panel correctly applied the principles enunciated in Hughes Aircraft

UP questions the panel's reliance on *Hughes Aircraft, supra,* noting that the decision in *Hughes Aircraft* upheld the carrier's limitation of liability. (Brief p. 14)

In *Hughes Aircraft,* there was a negotiated, written, bilateral contract which expressly incorporated the terms of the carrier's tariff which was on file with the ICC. The *Hughes Aircraft* court found – on the facts before it – that the shipper had "reasonable notice and an opportunity to make a deliberate, thoughtful choice in selecting North American's liability limit . . . " *Hughes Aircraft* at 612.

In the case at bar – based on the facts before it – the panel has found to the contrary.

6. The Bay State Shippers and C.R. England cases are distinguishable

UP refers to two district court decisions: *C.R. England and Sons, Inc. v. Atchison, T. & S.F. R. Co.,* 924 F.Supp. 757 (N.D. Tex. 1996), and *Bay State Shippers, Inc. v. Atchison, T.*

& S.F. R. Co., 1995 U.S.Dist. Lexis 20154, 1995 WL 865481 (C.D. Cal. 1995). (Brief p. 15) Both of these cases involved an exempt circular published by the Atchison, Topeka & Santa Fe Railroad.

A close reading of *Bay State Shippers* and *C.R. England* reveals that the language of the ATSF exempt circular is significantly different from the language of the UP circular involved in the case at bar. Specifically, the ATSF Circular Intermodal No. 1 provided that "If the shipper elected liability terms consistent with the Carmack Amendment, it would pay an additional charge of five percent of the applicable freight charges assessed, or $100 per shipment, whichever is greater." *Bay State*, slip op. @ 2. In other words, the rate for Carmack liability was clearly spelled out in the ATSF circular.

As noted above, in the case at bar, the UP circular does not contain *any* rate or premium for Carmack liability, only the cryptic statement: "Information including the charges for 'Section 11707 liability' can be obtained by calling our toll free phone numbers." No one, looking at this document, could be able to determine the rate for Carmack liability.

CONCLUSION

The Ninth Circuit correctly interpreted the facts and applied common law principles of reasonable notice and contract law. The petition for certiorari should be denied.

Dated: Huntington, New York
April 16, 1997

Respectfully submitted,

GEORGE CARL PEZOLD
RAYMOND A. SELVAGGIO
AUGELLO, PEZOLD & HIRSCHMANN, P.C.
120 Main Street
Huntington, New York 11743
Telephone: (516) 427-0100

ANDREW J. SKAFF
KAREN L. PETERSON
Counsel of Record
KNOX RICKSEN
1999 Harrison Street, Suite 1700
Oakland, California 94612
Telephone: (510) 893-1000

Attorneys for Respondent, Comsource Independent Foodservice Companies, Inc.